

No. 82-1324

Office-Supreme Court, U.S.

F I L E D

MAR 23 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL FARMERS' ORGANIZATION, INC.,
Petitioner,
v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN, INC. AND
CENTRAL MILK PRODUCERS COOPERATIVE,
Respondents.

**JOINT BRIEF FOR ASSOCIATED MILK
PRODUCERS, INC. AND CENTRAL MILK
PRODUCERS COOPERATIVE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

SYDNEY BERDE

Counsel of Record

RICHARD M. HAGSTROM

BERDE & HAGSTROM, P.A.
2606 American National

Bank Building
St. Paul, Minnesota 55101
(612) 291-8106

*Counsel for Central Milk
Producers Cooperative
Of Counsel:*

COLVIN A. PETERSON, JR.

WATSON, ESS, MARSHALL
& ENGGAS

1006 Grand Avenue
Kansas City, Missouri 64106
(816) 842-3132

DONALD M. BARNES

Counsel of Record

SALVATORE A. ROMANO

MICHAEL M. EATON

JOYCE L. BARTOO

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

*Counsel for Associated Milk
Producers, Inc.*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
A. Background	2
B. The Decisions Below	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972)	8, 9
<i>Faulkner v. Gibbs</i> , 338 U.S. 267 (1949)	7
<i>Grip-Pak, Inc. v. Illinois Tool Works, Inc.</i> , 694 F.2d 466 (7th Cir. 1982)	5, 7
<i>Kobe, Inc. v. Dempsey Pump Co.</i> , 198 F.2d 416 (10th Cir.), <i>cert. denied</i> , 344 U.S. 837 (1952)	7
<i>Mark Aero, Inc. v. Trans World Airlines, Inc.</i> , 580 F.2d 288 (8th Cir. 1978)	6
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965)	9
<i>United States v. Dickinson</i> , 331 U.S. 745 (1974)	7
<i>United States v. Otter Tail Power Co.</i> , 410 U.S. 366 (1973), <i>on remand</i> , 360 F. Supp. 451 (D. Minn. 1973), <i>aff'd</i> , 417 U.S. 901 (1974)	8, 9
STATUTES:	
Agricultural Fair Practices Act, 7 U.S.C. § 1303	2
§ 1 of the Sherman Act (15 U.S.C. § 1)	2, 3
§ 2 of the Sherman Act (15 U.S.C. § 2)	2, 3
OTHER AUTHORITY:	
Brief for the United States, <i>United States v. Otter Tail Power Co.</i> , 410 U.S. 366 (1973)	3-9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1324

NATIONAL FARMERS' ORGANIZATION, INC.,
Petitioner,

v.

ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN, INC. AND
CENTRAL MILK PRODUCERS COOPERATIVE,
Respondents.

**JOINT BRIEF FOR ASSOCIATED MILK
PRODUCERS, INC. AND CENTRAL MILK
PRODUCERS COOPERATIVE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Respondents Associated Milk Producers, Inc. ("AMPI") and Central Milk Producers Cooperative ("CMPC")* respectfully submit this joint brief in opposition to a Petition for Writ of Certiorari filed by the National Farmers' Organization, Inc. ("NFO"), Docket No. 82-1324, to review that part of a decision of the United States Court of Appeals for the Eighth Circuit which upheld the district court's findings that certain litigation was not instituted against NFO in bad faith. On February 25, 1983, respondents were granted an extension of time to and including March 25, 1983, in which to file this brief in opposition.

*AMPI's and CMPC's statements of affiliation required by Rule 28.1 are contained in their respective Petitions for Writs of Certiorari filed concurrently with this brief.

OPINIONS BELOW

The opinion of the court of appeals, reported at 687 F.2d 1173, appears in the Appendix to the Petition (hereinafter "A."), A. 1a. The opinion of the United States District Court for the Western District of Missouri is reported at 510 F. Supp. 381, A. 67a.

STATEMENT OF THE CASE

A. Background

This case began when Mid-America Dairymen, Inc. ("Mid-Am"), a dairy marketing cooperative, filed an action against the National Farmers' Organization, Inc. ("NFO") and Beatrice Foods Company. The complaint alleged that NFO and others had conspired to restrain trade in violation of § 1 of the Sherman Act, had violated the Robinson-Patman Act and that the defendants had interfered with Mid-Am's marketing agreements with its members. NFO filed a counterclaim alleging that Mid-Am, AMPI, Central Milk Producers Cooperative ("CMPC"), Associated Reserve Standby Pool Cooperative ("ARSPC"), each qualified Capper-Volstead Act dairy marketing cooperatives, and Beatrice Foods Company conspired to unreasonably restrain trade in violation of § 1 of the Act, and to monopolize in violation of § 2 of the Act. AMPI filed a counterclaim alleging that NFO and certain individuals had violated §§ 1 and 2 of the Sherman Act and had interfered with AMPI's marketing agreements with its dairy farmer members in violation of the Agricultural Fair Practices Act, 7 U.S.C. § 1303.

B. The Decisions Below

After an extended bench trial, the district court dismissed Mid-Am's claims and AMPI's counterclaims against NFO. The trial court also dismissed NFO's coun-

terclaims against Mid-Am, AMPI, CMPC and ARSPC after finding that NFO failed to prove the requisite factual predicate for violations of either §§ 1 or 2 of the Sherman Act.¹ The trial court also found a failure of proof concerning NFO's bad faith litigation claims. Specifically, the trial court found that NFO failed to prove that the defendants or any of them had instituted bad faith litigation against NFO. 510 F. Supp. at 503; A. 319a-320a.

The Eighth Circuit affirmed the trial court's findings that NFO's failure to prove a relevant geographic market doomed its claims of actual and attempted monopolization under § 2 of the Sherman Act. 687 F.2d at 1192; A. 29a. However, after an extensive *de novo* review, the appellate court held that AMPI, CMPC and Mid-Am had conspired to monopolize trade in violation of § 2, and that this, in turn, automatically constituted a violation of § 1 of the Act as well.² *Id.* at 1193; A. 30a.

The court of appeals, after an independent review of the record, held that the litigation initiated against NFO by Mid-Am in this case, and by AMPI in its counterclaim, and in a Wisconsin state court, did not constitute bad faith litigation under the *Noerr-Pennington* exemption. *Id.* at

¹ The Beatrice Foods Company was dismissed as a defendant in Mid-Am's case in 1976 and in NFO's counterclaim in 1977, after the completion of discovery and five years after the case had been initiated.

² As an essential predicate for its holding, the Eighth Circuit concluded that proof of a relevant geographic market is *not* required to establish a § 2 *conspiracy* to monopolize claim. AMPI and CMPC have concurrently filed Petitions for Writs of Certiorari seeking: (1) to correct this, and other fundamental errors of law; and (2) a definitive resolution of the paramount issues of federal law and irreconcilable conflicts with other circuits and this Court posed by the decision of the appellate court.

1200; A. 45a-46a. The court found that "[t]here were genuine disputes" between AMPI and NFO (and between Mid-Am and NFO) concerning NFO's unlawful solicitation and raiding of their respective members. *Id.* The appellate court agreed with the conclusion of the trial court that none of the litigation had been initiated in bad faith. However, the court concluded that litigation and threatened litigation directed at NFO's actual or potential customers for the member-milk in dispute was not exempt under the *Noerr-Pennington* doctrine. The court reached that conclusion based on its view that the scope of the *Noerr-Pennington* doctrine did not extend to such conduct directed at customers or potential customers, in contrast to actual competitors.

The court of appeals also held that certain third-party litigation filed against NFO was protected by *Noerr-Pennington* since the record did not support the conclusion that it had been brought in bad faith. *Id.* at 1200; A. 45a. Although petitioner repeatedly asserts that this third-party litigation was sponsored and maintained by AMPI, Petition at 5, 7, 9-10 n.3, 11, the probative evidence was to the contrary and neither the court of appeals nor the trial court made such a finding. 687 F.2d at 1200; A. 45a; 510 F. Supp. at 486; A. 283a-284a. Indeed, NFO's contention at trial and on appeal that the third party litigation was sponsored by anyone was rejected by the concurrent findings of both lower courts.

The appellate court further held that Mid-Am and AMPI had established a prima facie case of a *per se* price fixing violation against NFO; however, the court, recognizing that the question was a "close one," also held that NFO was entitled to the Capper-Volstead Act exemption despite its recruiting and maintaining non-farmers as members. 687 F.2d at 1186-87; A. 16a-18a.

REASONS FOR DENYING THE WRIT

Petitioner contends that the Eighth Circuit held that in order to be an actionable antitrust violation outside the *Noerr-Pennington* exemption, the litigation initiated against NFO had to be groundless. Petition at 5. The Eighth Circuit, however, did not so hold. A careful review of the Eighth Circuit opinion discloses that, despite NFO's characterization of the question as a "pure legal issue," over which there is an "irreconcilable conflict," the court of appeals simply affirmed the trial court's conclusion that the litigation was not instituted in bad faith. Thus, NFO's real quarrel is with the failure of both lower courts to adopt NFO's view of the evidence and find the requisite malevolent *intent* in filing certain lawsuits. The asserted conflict with *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), is nonexistent.

1. There simply is no question of law presented by NFO's Petition for Writ of Certiorari. The Eighth Circuit found that the initiation of litigation by Mid-Am against NFO and AMPI's counterclaim and state court action against NFO, *did not* constitute "a sham cover for what is really just an attempt to directly interfere with the business relations of a competitor [NFO]." 687 F.2d at 1200; A. 44a-45a. Although the court of appeals noted that the litigation against NFO "was intended *in part* to hamper NFO's ability to compete" (emphasis added), it also refused to conclude "that the legal claims against NFO were so groundless as to come within the 'sham litigation' exception to the *Noerr-Pennington* doctrine." *Id.* The court thus concluded that the respondents had not initiated the litigation in bad faith. Its dual findings—that the legal claims were not groundless and that the disputes were genuine—amply support the conclusion that the litigation

constituted genuine attempts to adjudicate those disputes.³

Contrary to NFO's suggestion, the court of appeals did not hold that in order to be actionable, and to come within the sham exception to *Noerr-Pennington*, the litigation had to be groundless. Nor did the court hold that, if there was merit to the litigation, the *Noerr-Pennington* exemption would automatically apply. Consistent with the leading Eighth Circuit decision construing the exemption, the court of appeals concluded that since the litigation constituted a genuine attempt to obtain a judicial resolution, it was not motivated by a bad faith intent. *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 296-97 (8th Cir. 1978).

2. The Eighth Circuit has correctly noted that "[t]he fundamental question presented in each case involving the 'sham' exception . . . is the question of intent." *Mark Aero, Inc. v. Trans World Airlines, Inc.*, *supra*, at 297. From different vantage points the appellate and trial courts agreed that the litigation was not motivated by any bad faith intent. Thus, the appellate court's determination turned on the resolution of the factual issue of intent and not on the legal issue posed in NFO's Petition. Under the guise of raising a legal question, petitioner is really seeking a *de novo* review by this Court of that peculiarly factual determination. Petitioner repeatedly asserts that AMPI sponsored third-party litigation against it. Contrary to these representations neither the trial nor the appellate court found, as a matter of fact, that AMPI sponsored

³The court of appeals defined "sham" to mean "governmental contacts which are not a genuine attempt to influence official decision-making . . ." 687 F.2d at 1195; A. 35a. It clearly applied the same definition to the allegedly "sham" litigation. This definition is the rule in the Eighth Circuit. *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978).

any third-party litigation. Petition at 5, 7, 9-10 n.3, 11; 510 F. Supp. at 486; A. 283a-284a; 687 F.2d at 1200; A. 45a. Thus, in order to reach the legal issue posed by petitioner, this Court must ignore, and thereby implicitly overturn, the concurrent fact findings of both the appellate and trial courts. See *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *United States v. Dickinson*, 331 U.S. 745, 751 (1947).

3. There is no conflict between the Eighth Circuit's decision in this case and the Seventh Circuit's decision in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982). The Eighth Circuit did not hold that the litigation had to be groundless in order to be an actionable antitrust violation. Although the court in *Grip-Pak* noted that the Eighth Circuit's opinion "appears to be to the contrary," 694 F.2d at 473, a careful analysis of both decisions belies that observation. Both decisions recognized that the "sham" exception turns on intent, i.e., whether the litigation was instituted as a genuine attempt to resolve disputes adjudicatively.

Furthermore, the Seventh Circuit's pronouncement in *Grip-Pak*, which analyzed the *Noerr-Pennington* doctrine, was not a holding but rather was provided "for the guidance of the parties and the district court on remand." 694 F.2d at 470. Indeed, the court noted: "Still, we think it is premature to hold that litigation, unless malicious in the tort sense [initiated without probable cause], can never be actionable under the antitrust laws." *Id.* at 472. Thus, there is no conflict between the holding of the court of appeals in this case and the *Grip-Pak* decision.⁴

⁴The decision in *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-25 (10th Cir.), cert. denied, 344 U.S. 837 (1952), provides no support to petitioner's attempt to use this case as a vehicle for having

4. The Eighth Circuit's decision does not conflict with the decisions of this Court. Contrary to petitioner's characterization of the decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court did not reach, let alone reject, "[t]he proposition that the *Noerr-Pennington* doctrine exempts all but groundless anticompetitive lawsuits . . ." Petition at 12. The crux of the allegation scrutinized in *Trucking Unlimited*, as noted by this Court, was that "petitioners instituted the proceedings and actions . . . with or without probable cause, and *regardless of the merits of the cases.*" 404 U.S. at 512 (emphasis added). Thus, the allegation that proceedings were instituted without regard to their merit was indicative that the underlying purpose was not to obtain governmental action; rather it was designed to bar competitors from meaningful access to adjudicatory tribunals by the initiation of repetitive, baseless claims.

Furthermore, this Court's holding in *United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973), does not conflict with the holding in this case. That case merely confirmed the *Trucking Unlimited* holding that the *Noerr-Pennington* exemption also applied to administrative and judicial proceedings. The petitioner's suggestion that *Otter Tail* involved "some lawsuits which succeeded at trial" is inaccurate. In the Brief for the United States, cited by NFO, the Government noted: "Thus, although all of Otter Tail's suits were *unsuccessful* on the merits as a matter of law, they succeeded as a matter of anticompetitive tactics in delaying the establishment of municipal systems for

this Court second-guess the concurrent findings of the trial court and court of appeals that the litigation against NFO was not instituted in bad faith. *Kobe* turned on the fundamental and peculiarly factual findings of intent under the particular circumstances of that case, after a full trial on the merits.

substantial periods." Brief for the United States at 79, *United States v. Otter Tail Power Co.*, *supra*, (emphasis added).⁵ On remand the trial court held that Otter Tail's litigation came within the sham exception to the *Noerr-Pennington* doctrine as explained in *Trucking Unlimited*. See 360 F. Supp. at 452. Neither this Court's decision nor the district court's decision in *Otter Tail* suggests that the merit or lack of merit of the underlying claims is the dispositive question in applying the sham exception.

5. In view of the concurrent findings of the trial court and appellate court that the litigation against NFO was not instituted in bad faith, this case raises nothing more than the peculiarly factual issue of intent. Thus, the Eighth Circuit's decision does not provide a vehicle for this Court to consider the question whether meritorious litigation can ever fall within the sham exception to the *Noerr-Pennington* doctrine.

6. In contrast to the factual question implicit in NFO's Petition, there are indeed genuine and significant legal issues involving the *Noerr-Pennington* doctrine posed by the Eighth Circuit's decision. That court predicated its finding of the existence of an unlawful conspiracy on exempt *Noerr-Pennington* and Capper-Volstead Act joint conduct. That holding directly conflicts with the holding of this Court in *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Moreover, the Eighth Circuit's conclusion that the *Noerr-Pennington* exemption does not encompass litigation and threats of litigation directed at customers or potential customers of a com-

⁵ The Government also noted that seven suits instituted by or supported by Otter Tail were ultimately unsuccessful on the merits, with the partial exception of one of the suits. *Id.* at 27.

petitor presents a pure legal issue as to the scope of the exemption. Neither *Noerr-Pennington* nor its progeny limit its protection to threatened or actual litigation directed at competitors, as opposed to their customers. These important legal issues are raised in AMPI's separate Petition for Writ of Certiorari filed concurrently with this brief.

CONCLUSION

The resolution of the uniquely factual issue of intent by the lower courts does not rise to the level of a "pure legal issue" meriting plenary review by this Court. Accordingly, the Petition should be denied.

Respectfully submitted,

SYDNEY BERDE
Counsel of Record
 RICHARD M. HAGSTROM
 BERDE & HAGSTROM, P.A.
 2606 American National
 Bank Building
 St. Paul, Minnesota 55101
 (612) 291-8106
*Counsel for Central Milk
 Producers Cooperative*
Of Counsel:
 COLVIN A. PETERSON, JR.
 WATSON, ESS, MARSHALL
 & ENGGAS
 1006 Grand Avenue
 Kansas City, Missouri 64106
 (816) 842-3132

DONALD M. BARNES
Counsel of Record
 SALVATORE A. ROMANO
 MICHAEL M. EATON
 JOYCE L. BARTOO
 ARENT, FOX, KINTNER,
 PLOTKIN & KAHN
 Washington Square
 1050 Connecticut Avenue, N.W.
 Washington, D.C. 20036-5339
 (202) 857-6000
*Counsel for Associated Milk
 Producers, Inc.*

March 25, 1983